No. 495

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

WJR, THE GOODWILL STATION, INC., AND COASTAL PLAINS BROADCASTING CO., INC., INTERVENOR-RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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1. Respondent insists that the Commission's failure to move to dismiss respondent's appeal and its position that respondent's right to resort to the courts for review of the correctness of the Commission's decision is an adequate constitutional safeguard (Br. 41) are admissions that respondent "has a standing before the Commission as an inter-

occasion dispensed with oral argument and decided cases on written argument alone. Consequently, some additional burden would result even in such cases were the *WJR* decision to be controlling.

A far greater impact would result, however, if the *WJR* case were deemed to require oral argument in the many situations where no statutory provision for hearing is made. As pointed out above, there are a number of situations in which the Act has authorized the Board to act without requiring notice and hearing. In such situations the Board has regularly proceeded upon the assumption that oral argument was not necessary to the disposition of the matter, even though a substantial question of law might be present. The Board has conducted itself accordingly, hearing oral argument only occasionally where there seemed to be special reason therefor. to require oral argument in all such matters would create a serious additional demand upon the time of the Board without corresponding benefits in our opinion.

Perhaps the most important such category has been in the exercise of the Board's authority under Section 416 (b) of the Act to grant exemptions from the requirements of the Act. This power has been frequently invoked, and the Board has regularly denied applications for such exemptions, and also granted them despite the protests

of interested persons without allowing oral argument thereon. To hear oral argument in each such matter whenever requested by the applicant or an objector would impose a substantial burden of additional work on the Board as shown by the fact that during 1948 the Board disposed of 65 such applications, in none of which oral argument was heard.

Similarly, the Board is authorized to approve or disapprove, without hearing, contracts filed under Section 412, interlocking relationships filed under Section 409 (a), requests for suspension of service under Section 401 (k), requests for non-stop services and changes in service patterns and airports filed pursuant to regulation. Most of these result in approvals, and as a matter of practice the Board has frequently provided for hearing and oral argument before denying (or before granting over objection). However, in a substantial number of cases involving denial or grant over objection, oral argument is not heard by the Board prior to disposition of the matter.

With particular respect to your question whether the Board dismisses applications without oral argument, the Board has on a few occasions done so. The Board has on a number of occasions denied motions to dismiss without oral argument. Whether these actions are interlocutory in character and hence not covered by the *WJR* decision is difficult to ascertain. In addition, of

of contentions that the Board committed error. In *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board* (No. 10,089) the petitioner appealed from an order of the Board denying a request for exemption from the statutory requirements of the certificate of public convenience and necessity to engage in air transportation, contending that the failure to hear oral argument before dismissing the application constituted reversible error. In *Pan American-Grace Airways, Inc.* v. *Civil Aeronautics Board, et al.* (No. 9914) the petitioner appealed from an order of the Board denying a request for a hearing to determine whether the certificate of public convenience and necessity held by a competitor of petitioner should be suspended or modified. Although the Board heard oral argument before dismissing petitioner's application, petitioner contends that the oral argument as conducted did not meet the requirements of the *WJR* case.

As indicated above, it is our belief that Section 1004 (a) of the Act authorizes the Board to exercise a reasonable discretion in determining whether it will hear oral argument. To override the statute by imposing thereon a constitutional requirement of oral argument whenever a substantial question of law is presented would impose a rigidity which in our opinion is not required to protect private interests and would seriously hamper the Board's performance of its functions.

I hope that the foregoing provides you with the information that you desire. We would, of course, be happy to elaborate upon it in any way that would be helpful to you.

Sincerely yours,

Emory T. Nunneley, Jr.,
EMORY T. NUNNELEY, Jr.,
General Counsel.

Att. (1).

COMMISSION REPORTS:

STATUTE:

REGULATIONS:

MISCELLANEOUS:

IN THE

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OCTOBER TERM, 1948

No. 495

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

WJR, THE GOODWILL STATION, INC., *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, WJR, The Goodwill Station, Inc., the appellant below, opposes the petition of the Federal Communications Commission for the issuance of a writ of certiorari to the United States Court of Appeals, District of Columbia, for review of its judgment entered in this case. Coastal Plains Broadcasting Company, Inc., the Applicant before the Commission and the Intervenor before the Court below, has not entered an appearance or filed any petition before this Court in this case.

ested party." (Respondent Br. 23). Whether or not this is so, it does not serve to resolve the issue tendered as to the validity of the procedure followed by the Commission. For there is no sharp line between a determination of the merits of respondent's claim of modification and the question of respondent's standing to seek review of a Commission decision adverse to it on this issue. At no time has the Commission suggested that respondent had not sufficient standing to seek relief from the Commission; its consistent position has been that the respondent is not entitled to relief. And while it may be that the respondent's claim is so obviously inadequate that a reviewing court could affirm the Commission not only on the merits but because of the respondent's lack of standing, the Commission has not seen fit to press that view. For, in any event, a judicial determination of the legal adequacy of the respondent's claim, whether couched in substantive terms or in terms of standing, is available.

Reference may be made, however, to the unsettled state of the law on the standing issue. In *Federal Communications Commission* v. *National Broadcasting Company* (*K O A*), 319 U. S. 239, the issue of jurisdiction, not raised by the Commission in the court below or in this Court on petition for certiorari, was raised for the first time on argument in this Court, and was considered, since it was an issue which could not be foreclosed (319 U. S. 239,

246). On that issue, this Court held that K O A did have standing to appeal as a "person aggrieved" since it had established, and the Court concluded, that, in the light of the provisions of the rules governing the frequency to which it was assigned, its license would be modified by the Commission action appealed from. This decision does not, therefore, squarely decide the question of the standing, as a "person aggrieved", of a licensee who is able to make a factual showing of electrical interference to its service area beyond its protected contours but is not able to show that its license would be modified by the Commission action on which it seeks a hearing. The dissenting opinions in the *K O A* case (319 U. S. 239, 248, 264) plainly reflect a judgment that the mere existence of interference beyond the protected contours does not confer standing on the licensee. While the law on this issue is therefore not yet authoritatively settled for the purposes of the situation presented in this case, it is at least evident enough that, in the light of the *K O A* decision, the question of whether the respondent in fact properly alleged a threatened modification of its license, in the light of the applicable provisions of the Rules and Standards, must be judicially resolved. These issues have been presented to the court below on brief and arguments and are being presented to this Court. It is obvious enough that whatever the ultimate resolution of the issue of standing, respondent is having

its day in court on the question whether the Commission properly measured its interests as licensee. Certainly, the Commission cannot confer jurisdiction where it may not exist by the manner in which it couches its argument that its action was proper. See *United States* v. *Corrick*, 298 U. S. 435.

2. Respondent contends (Br. 27) that neither the statute, its license, nor the Commission's Rules and Regulations refer to the "100 uv/m contour". It follows, says the respondent, that there is no provision of law which limits the protection to which a Class I station is entitled to the 100 microvolt contour. But Section 3.28(a) of the Rules states explicitly that the "individual assignments of stations to channels which may cause interference to other United States stations, *shall be made in accordance with the standards of good engineering practice prescribed and published from time to time by the Commission* * * *" (italics supplied). See Appendix A to our main brief, pp. 58-59. These provisions are made applicable to Section 3.25(a) for the purpose of determining in what manner a Class II daytime station may be assigned on the frequency 760 kilocycles in accordance with the express provisions of Section 3.25(a) authorizing such assignments, without impairing the rights conferred on Class I stations on the channel.

Respondent also ignores the provision of Section 3.22(a) (main brief, p. 57) which defines a Class I station and the extent to which it is entitled to pro-

tection in terms of the provisions of Section 3.25 of the Rules and the provisions of the "Engineering Standards of Allocation." These Rules and their explicit reference to the Engineering Standards of Allocation make it clear enough that, whatever the status of other portions of the Commission's Standards of Engineering Practice, the provisions of the Engineering Standards of Allocation defining the extent of the protected service area of a Class I station are expressly incorporated into the Rules and Regulations.[1] Indeed, the respondent recognizes that there are provisions of the Standards "which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations." (Resp. br. 32, note 18.)

In the course of respondent's discussion of the "primary service" and "secondary service" areas defined by Rule 3.11 (Br. 28-32), it makes no allegation or showing that anything in the Standards with respect to these types of service areas affords

[1] Respondent alludes to a sentence in the form of application for a new standard broadcast station construction permit in use at the time Coastal Plains made application as showing that the Commission itself did not regard the provisions of the Rules and Standards defining protected contours and objectionable interference as having the binding status of Rules and Regulations (Br. 31). But in the light of the express provisions of the Commission's Rules discussed above and the decision of this Court in the *KOA* case, it is obvious enough that no weight can be given to a vestigial remnant of forms in use prior to the *KOA* decision, which has since been eliminated from the Commission's forms. See FCC Form 301 adopted October 16, 1947, 12 Fed. Reg. 7079; 1 Pike and Fischer, *Radio Regulation* 98:101.

any basis for a contention that a Class I-A licensee is entitled to protection outside its 100 microvolt contour during daytime hours. It is in its discussion of the "intermittent service" area that respondent seeks to stretch the protection of the Standards beyond the 100 microvolt contour. Thus, respondent assumes that because, under some circumstances, Class I stations may be entitled to protection in their intermittent service areas, it follows that respondent is entitled to protection in an intermittent service area which is admittedly outside its 100 microvolt contour. A fair reading of the *Standards* shows, however, that intermittent service areas of Class I stations are indeed protected, but only when they are within the 100 microvolt contour.

Section 3.11 of the Commission's Rules and Regulations states that "the term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Table I of the *Standards of Good Engineering* (page 5) describes what is meant by primary or satisfactory groundwave service and defines the field intensity of groundwave signals necessary to render adequate service in different types of geographical areas. For example, in a southern rural area during the summer, a signal of between 250 microvolts to 1000

microvolts per meter in intensity is required for satisfactory service. In such a locale, the outer boundary of the primary service area would be at the 250 microvolts per meter contour; from that point the intermittent service area would begin. In that situation, the 100 microvolts per meter contour of a Class I station would no longer be in the primary service area, but in the intermittent service area. But despite the fact that the 100 microvolts per meter contour may include intermittent service, the Commission's *Standards of Good Engineering* both by Table IV, (Appendix A, main brief, p. 60) and express language on page 2 of the *Standards,* afford unqualified protection to such a station from objectionable interference up to the 100 microvolts per meter service contour. It is in this context that the Commission's *Standards of Good Engineering* state "only Class I stations are assigned for protection from interference from other stations *into* the intermittent service area." [italics supplied,]

3. Respondent seizes on the Commission's illustrative use of the holding of the court below on the insubstantiality of respondent's claim based on the pendency of the Clear Channel Hearing (Commission Br. 41), as a means of raising here for the first time issues which were not raised by respondent in its petition for rehearing (R. 14-16), or in its notice of appeal to the court below (R. 1-6), and certainly

not by way of a cross-petition for a writ of certiorari.[2]

Thus, respondent now alleges that the facts presented in its petition for rehearing also raised the issues whether the Commission's Public Notice of June 21, 1946, was invalid and whether the Commission improperly failed to add to the Coastal Plains grant a condition making it subject to a final determination in the Clear Channel Hearing (R. Br. 24-25). But respondent's reminiscences about issues which it might have raised cannot now take the place of timely allegations which do not appear in the petition for rehearing before the Commission and the notice of appeal (R. 14-16; 1-6).

4. The observations of Judge Learned Hand in the recent case of *Fay* v. *Douds,* 172 F. 2d 720, 725 (C. A. 2) are highly relevant to the issue presented for decision by the opinion of the court below:

> Upon such a record the defendant's denial of any hearing was right. Neither the statute, nor the Constitution, gives a hearing where there is no issue to decide; and in the face of the correspondence it rested upon the Local at least to suggest some circumstances which would meet the case against it, to all appear-

[2] The Commission, of course, does not challenge the correctness of the decision of the court below that respondent's claim based on the pendency of the Clear Channel Hearing was insubstantial. It agreed both with the substance of the holding and its implicit approval of the Commission's disposition of that issue without oral argument.

ances impregnable. The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests. Every summary judgment denies a trial upon issues formally valid. Where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege. These considerations are particularly appropriate when we consider that the Board must conduct its duties in a summary way; not, we hasten to add, without observing all the essentials of fair administration, but with as much dispatch as is consistent with those.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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